

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GLORIA L. MARTINEZ)	
Claimant)	
VS.)	
)	
SMITH AND LOVELESS, INC.)	
Respondent)	Docket No. 264,577
)	
AND)	
)	
WAUSAU INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requested review of the October 22, 2002 Award entered by Administrative Law Judge (ALJ) Robert H. Foerschler. The Appeals Board (Board) heard oral argument on May 6, 2003. Gary Peterson was appointed and participated in this appeal as a Board Member Pro Tem.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for claimant. Terence M. O'Malley of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.

ISSUES

This claim results from an April 8, 1998 injury to claimant's low back and left upper extremity. Judge Foerschler awarded claimant a 20 percent permanent partial general body disability based upon functional impairment. Claimant contends she is permanently and totally disabled. In the alternative claimant argues that she is entitled to a work disability award greater than her percentage of functional impairment.

Respondent asks for the ALJ's award to be affirmed in all respects.¹ During oral argument to the Board, however, respondent acknowledged that the 20 percent functional impairment found by the ALJ was less than the percentages of impairment opinions of any of the medical experts when the ratings for the upper extremity are combined with the ratings for the back injury. If work disability is awarded, respondent argues that the work disability should be 25.25 percent based upon a 17 percent wage loss and a 33.5 percent task loss.

The nature and extent of claimant's disability is the only issue for review.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds that claimant is not permanently and totally disabled but that the ALJ's Award should nevertheless be modified to award a work disability, and a post-injury wage should be imputed to claimant based upon her ability to earn wages.

The record contains the expert medical testimony of three physicians. Dr. Jeffrey T. MacMillan and Dr. Regina M. Nouhan were authorized by respondent to treat claimant's work-related injuries. Dr. Truett L. Swaim examined claimant at the request of her attorney. In addition, although claimant was never provided with vocational rehabilitation nor job placement services, two vocational experts testified; Michael J. Dreiling on behalf of claimant and Terry L. Cordray on behalf of respondent. Their testimony primarily concerned claimant's pre-injury job tasks and her post-injury wage earning ability. Claimant also testified about her physical and vocational limitations and abilities.

Dr. MacMillan is a board certified orthopedic surgeon who began treating claimant's low back injury on January 5, 1999 and continued providing treatment until March 7, 2000. During that period he saw claimant approximately 19 times. His treatment included

¹ Respondent does note that the award contains a computation error which should be corrected by the Board.

performing an anterior interbody fusion at the L4-L5 and L5-S1 levels, fusing the spine with a combination of titanium implants and bone from claimant's pelvis.

Dr. MacMillan opined that claimant has a 25 percent whole person impairment based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) as a result of her work-related back injury. Dr. MacMillan was not asked whether claimant had a permanent functional impairment that preexisted her work-related injury, nor did he say that any portion of his impairment rating was attributable to her preexisting condition. Furthermore, Dr. MacMillan's rating was only for the claimant's back injury. He did not provide an impairment rating for her upper extremity.

Dr. MacMillan recommended claimant avoid repetitive or extended periods of bending or stooping. In addition, she should not lift or carry more than 25 pounds. Dr. MacMillan placed claimant on the low end of the scale with regard to the amount of improvement she obtained from the surgery. He also diagnosed claimant with chronic pain syndrome. When asked his opinion concerning her ability to perform previous work tasks, out of the 15 total tasks identified on the list prepared by Mr. Cordray, Dr. MacMillan did not completely eliminate any of the job tasks claimant had performed during the 15 years before her accident, but he was uncertain about the task requirements and of claimant's present ability to perform five or six of those 15 tasks. Moreover, when Dr. MacMillan was deposed on June 4, 2002, he acknowledged that his opinion of claimant's condition and functional capacity was as of the date that he had last examined claimant. He acknowledged that any changes in claimant's condition during the intervening two years could affect his opinions about claimant's restrictions and task performing ability.

Dr. Nouhan is a board certified plastic and hand surgeon who initially examined claimant on July 26, 1999, following testing that showed moderate to moderately severe carpal tunnel syndrome on the left. Claimant's physical examination and symptoms were consistent with that diagnosis. Claimant underwent surgery in August 1999 and received physical therapy. Claimant was last seen by Dr. Nouhan on August 19, 1999. Dr. Nouhan rated claimant's impairment at ten percent to the upper extremity. Although Dr. Nouhan said her rating was pursuant to the AMA Guides, she was not able to say what edition of the *Guides* she used. Dr. Nouhan did not recommend claimant eliminate any of the tasks she performed before her injury but acknowledged that tasks requiring handling and fingering could cause pain if done repetitively or for prolonged periods. She did restrict frequent lifting to 15 pounds and recommended a maximum single lift limit of 35 pounds.

Dr. Swaim is a board certified orthopedic surgeon who examined claimant on August 2, 2001. Based upon his examination and review of the records, including the myelogram, CT scan and x-ray studies, Dr. Swaim believed that claimant continued to have impingement at the L4-5 and L5-S1 levels causing her radicular symptoms. This impingement could be scarring, a recurrent disk herniation or from the instrumentation inserted during surgery. In his opinion, additional surgery such as a posterolateral fusion,

then a decompressive laminectomy and foraminotomy was a possibility, as was surgery to remove some portion of the metal instrumentation. Dr. Swaim's examination included claimant's back and her upper extremities. He rated her functional impairment at 28 percent which was a combined rating for the back and the left upper extremity and which also took into consideration claimant's preexisting condition.²

Based upon the task list prepared by Mr. Dreiling, Dr. Swaim believed claimant retained the ability to perform only two out of the 15 tasks for a loss of 87 percent. Based upon the job task list prepared by Mr. Cordray, Dr. Swaim did not believe claimant retained the ability to perform any of those tasks which results in a 100 percent task loss. Dr. Swaim recommended restrictions of sedentary work only and limited force exertion up to ten pounds occasionally. Bending and stooping was limited to infrequently and he recommended that claimant change positions frequently. Dr. Swaim did not know whether claimant is employable in the open labor market. He deferred to the vocational experts on that question. He did say that he believed claimant could perform the job of a telemarketer if she was able to change position from sitting to standing as needed. Dr. Swaim also noted that claimant was on pain medication and that certain types of medication could affect her ability to concentrate or focus on tasks.

Vocational expert Michael J. Dreiling interviewed claimant at the request of her attorney and prepared a list of job tasks claimant performed during the 15 years before her injury. His list contained 15 separate tasks. In his opinion, claimant was not employable within the restrictions recommended by Dr. Swaim. However, when utilizing Dr. MacMillan's restrictions he believed claimant was employable and could earn between \$8 and \$9 dollars an hour.

Terry L. Cordray is the vocational expert who examined claimant on behalf of respondent. He likewise prepared a task list totaling 15 tasks. Based on Dr. MacMillan's restrictions, Mr. Cordray believed claimant could earn between \$8 and \$10 per hour. He acknowledged that if Dr. Swaim's restrictions were utilized it would be difficult for claimant to obtain and perform work in a competitive work environment. Furthermore, if claimant needed to lie down every couple of hours this would probably take her out of the open labor market entirely.

Claimant testified that she continues to take pain medication and is under the care of a pain management specialist, Dr. Howard Aks. Dr. Aks placed a dorsal column stimulator, which acts much like an electronic acupuncture device in the back. When she was released to return to restricted duty work by Dr. MacMillan, respondent did not provide her with an accommodated job. She has not worked since her accident and has

² Dr. Swaim reduced his 31 percent rating to the back by ten percent for pre-existing impairment, and then added nine percent for the upper extremity using the combined values chart in the AMA Guides.

essentially not looked for work and considers herself to be totally disabled. Lifting anything over five or ten pounds causes pain in her low back and down both legs. She must lie down or sit in a recliner chair with her leg up to relieve the pain. She must do this six to seven times a day for 20 minutes to relieve her symptoms. Bending, stooping or prolonged sitting also causes pain. She obtains incomplete pain relieve from pain medication. The pain and the medication make it difficult for her to concentrate.

The Board finds all three medical experts to be credible and believes claimant's true abilities lie somewhere between the restrictions recommended by Dr. MacMillan and Dr. Swaim. Although claimant believes herself to be unemployable, the fact is that she has never attempted employment since her surgery. As noted by Dr. MacMillan, she demonstrated an ability to perform tasks during physical therapy which exceeded her self-described limitations. The Board finds claimant retains the ability to perform substantial gainful employment.

Based on the testimony of the vocational experts and considering claimant's limited job skills and restrictions, the Board finds her wage earning ability to be \$8 per hour or \$320 per week. Claimant failed to make a good faith effort to find appropriate employment and therefore this wage should be imputed to her.³ When the imputed wage is compared to the stipulated average weekly wage of \$431.56, claimant's wage loss is 26 percent. Her task loss lies somewhere between the 87 to 100 percent opinion by Dr. Swaim and the possible zero percent opinions of Drs. MacMillan and Nouhan. Although Dr. MacMillan acknowledged that it was questionable whether or not claimant could perform at least five of the 15 job tasks, he never gave an opinion eliminating any task. The Board will, therefore, average Dr. MacMillan's zero percent task loss opinion with Dr. Swaim's 87 percent and find claimant's task loss is 43.5 percent. When her 43.5 percent task loss is averaged with her 26 percent wage loss, as required by K.S.A. 44-510e, claimant's work disability is 35 percent. A permanent partial disability award should be entered based upon this percentage.

Dr. MacMillan's 25 percent functional impairment rating did not include a rating for the upper extremity and if combined with Dr. Nouhan's upper extremity rating a functional impairment of 30 percent would result.⁴ Dr. MacMillan however, was not asked to give an opinion concerning claimant's preexisting impairment. Dr. Swaim rated claimant's

³ *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

⁴ Dr. Nouhan's ten percent left upper extremity rating converts to a six percent whole body rating and when combined with Dr. MacMillan's 25 percent for the back, using the combined values chart in the *AMA Guides*, results in a 30 percent rating to the body as a whole. Dr. Swaim rated claimant's left upper extremity impairment as fifteen percent. This converts to a nine percent whole body rating and would combine with Dr. MacMillan's 25 percent for a total of 32 percent.

upper extremity at 15 percent, which he converted to a nine percent whole person impairment and combined with the 21 percent to the back for a 28 percent total impairment. The 28 percent functional impairment rating by Dr. Swaim not only includes a rating for the upper extremity injury but also is reduced by the percentage of functional impairment to the back that he determined preexisted claimant's work related injury. Accordingly, the Board finds Dr. Swaim's 28 percent function impairment rating to be the most credible and adopts same as its finding in this case. The findings and conclusions set forth by Judge Foerschler in his Award are otherwise adopted to the extent that they are not inconsistent with the findings and conclusions set forth above.

Award

WHEREFORE, the Appeals Board finds that Administrative Law Judge Robert H. Foerschler's October 22, 2002 Award should be modified as follows:

Claimant is entitled to 95 weeks of temporary total disability at the rate of \$287.72 per week or \$27,333.40 followed by 117.25 weeks at \$287.72 per week or \$33,735.17 for a 35 percent permanent partial general body disability making a total award of \$61,068.57. As of May 13, 2003, there would be due and owing to the claimant 95 weeks of temporary total disability compensation at \$287.72 per week in the sum of \$27,333.40 plus 117.25 weeks of permanent partial compensation at \$287.72 per week or \$33,735.17 for a total due and owing of \$61,068.57 which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of May 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Terence M. O'Malley, Attorney for Respondent and Wausau Underwriters Ins. Co.
Robert H. Foerschler, Administrative Law Judge
Director, Workers Compensation Director